



IT IS ORDERED as set forth below:

Date: May 10, 2010

C. Ray Mullins

**C. Ray Mullins
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:

TYRONE FRANKLIN LAMAR,

Debtor.

CHAPTER 13

CASE NO. 09-88910-CRM

JUDGE MULLINS

TYRONE FRANKLIN LAMAR,

Plaintiff,

v.

CITIBANK, NATIONAL
ASSOCIATION,

Defendant.

ADVERSARY PROCEEDING NO.
10-06008-CRM

ORDER

THIS MATTER is before the Court on the Motion for Default Judgment (the “Motion”) filed by the Debtor. On January 6, 2010, the Debtor filed the Complaint to Determine the Value of Security and Creditor’s Allowed Secured Claim (the “Complaint”) and a summons was issued requiring the Defendant to file and serve an answer or a response.

According to the certificate of service, the Debtor properly served a copy of the complaint and the summons on the Defendant by certified mail on January 6, 2010. Bankruptcy Rule 7012 requires a defendant to “serve an answer within 30 days after the issuance of the summons.” No response has been filed or served. Accordingly, the Debtor has filed the Motion pursuant to Rule 55 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rule 7055 of the Federal Rules of Bankruptcy Procedure.

A failure to respond to a complaint does not end the Court’s inquiry into the validity the Motion. Rule 55 provides that the entry of default judgment is discretionary. *Doe v. Clifford Fort Myers, LLC*, No. 07-cv-00334-FtM-34SPC, 2008 U.S. Dist. LEXIS 31310, at *2 (M.D. Fla. Apr. 16, 2008).

[A] defendant’s default does not in itself warrant the court entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered. . . . The defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law. In short . . . a default is not treated as an absolute confession of the defendant of his liability and of the plaintiff’s right to recover.

Nishimatsu Constr. Co., Ltd. v. Houston Nat’l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975); *see also DIRECTV, Inc. v. Huynh*, 318 F. Supp. 2d 1122, 1127 (M.D. Ala. 2004); *McCoy v. Johnson*, 176 F.R.D. 676, 679 (N.D. Ga. 1997); *Bruce v. Wal-Mart Stores, Inc.*, 699 F. Supp. 905, 906 (N.D. Ga. 1988). Accordingly, the Court must determine whether the facts alleged constitute a legitimate claim for relief. *See* 10 Alan N. Resnik, Henry J. Sommer, & Lawrence P. King, *Collier on Bankruptcy* ¶ 7055.02 (15th ed. rev. 2004) (“Upon a default, the court is generally required to deem as true the well pleaded allegations of a complaint, but it is not required to agree that the pleaded facts constitute a valid cause of action.”).

The Debtor seeks to avoid the Defendant’s lien pursuant to 11 U.S.C. § 506(a) and (d). Also, the Debtor alleges that the Defendant does not have a secured claim because there was no equity in the property when the loan was executed.

According to 11 U.S.C. § 506(a),

An allowed claim of a creditor secured by a lien on property in which the estate has an interest. . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property. . . and is an unsecured claim to the extent that the value of such creditor's interest. . . is less than the amount of such allowed claim.

Further, a lien is void to the extent that it secures a claim that is not an allowed secured claim. 11 U.S.C. § 506(d). Several factors impact the value of a secured claim including the value of senior liens, the priority of the lien, and the value of the collateral. The nature and priority of a lien is determined by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979). According to Georgia law, a properly recorded deed "shall have priority over subsequent deeds." O.C.G.A. §§ 44-2-3 & 44-14-63.

There is no clear consensus on the appropriate time to determine the value of a secured claim. *See e.g. Johnson v. GMAC*, 165 B.R. 524 (S.D. Ga. 1994) (petition date); *In re Crain*, 243 B.R. 75 (Bankr. C.D. Ca. 1999) (effective date of Chapter 13 plan). However, no court has held that the value of the secured claim should be based on the availability of equity when the loan was executed. The plain language of the statute suggests that the value of the secured claim can not be determined pre-petition. According to the statute, a creditor's claim is secured to the extent of the "creditor's interest in the estate's interest in such property." 11 U.S.C. § 506(a). The estate can not have an interest in property until it is created. An estate is created by the filing of a petition for relief pursuant to 11 U.S.C. § 541(a). It follows that the value of a secured claim can not be determined until after the petition is filed. Therefore, the amount of equity in the property when the loan is executed is not relevant to § 506.

According to the Complaint, the Debtor owns real property subject to liens in favor of the Defendant, U.S. Bank and Green Tree Servicing. The Defendant filed a proof of claim in the amount of \$9,425.61 secured by a deed recorded on February 17, 2006. The Debtor alleges that U.S. Bank has a claim of \$214,662.00 secured by a deed recorded on August 15, 2007. Finally, Green Tree filed a proof of claim for \$85,358.25 secured by a deed recorded

on September 4, 2007. The Defendant recorded its deed almost eighteen months before U.S. Bank or Green Tree filed their deeds. Based on these facts, the Defendant has an allowed secured claim of \$9,425.61 which can not be avoided under § 506(d).

The Debtor has failed to allege facts that constitute a legitimate claim for relief. Accordingly,

IT IS ORDERED that the Motion be and is hereby **DENIED**.

The Clerk's Office is directed to serve a copy of this Order upon the Debtor, the Debtor's counsel, the Defendant, and the Chapter 13 Trustee.

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